A

YONG KIM NYIEN v. PP

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
RHODZARIAH BUJANG JCA
KAMALUDIN MD SAID JCA
B [CRIMINAL APPEAL NO: Q-05(SH)-565-12-2017]
5 DECEMBER 2018

CRIMINAL LAW: *Penal Code – Section 304(a) – Culpable homicide not amounting to murder – Whether Exception 1 to s. 300 of Penal Code applied – Defence of grave and sudden provocation – Whether there was intention to cause death of deceased – Whether accused could be given outright discharge amounting to acquittal if his right to private defence established – Mitigating factors taken into consideration – Whether sentence of 12 years' imprisonment adequate*

D The appellant, a 67 year old man, was originally charged with the murder of the deceased, his 46 year old lived-in mistress, a Chinese national, at his house. After a full trial, the Judicial Commissioner ('JC') found on the facts that Exception 1 to s. 300 of the Penal Code applied and convicted the appellant for culpable homicide not amounting to murder. He was sentenced to 12 years' imprisonment. The facts showed that the deceased was found E lying in a pool of blood on the kitchen floor with a broken stool by her side. The appellant was subsequently arrested and whilst being questioned, admitted that he had quarrelled with the deceased and had hit her with a wooden stool in retaliation to her attacks on him after he refused to give her money to purchase an airline ticket to go back to China. According to the F appellant, the deceased had thrown a wooden stool at him and she had continued chasing him with another wooden stool. It was in the kitchen that he retaliated with his own wooden stool. The deceased had suffered altogether 40 injuries on her body caused by blunt force trauma as a result of being hit by a blunt object. The fatal injuries were those to the head which G led to subdural haemorrhage. The appellant himself had suffered injuries which could be described as defensive injuries. The JC, after evaluating the evidence, came to the conclusion that the appellant had attacked the deceased due to grave and sudden provocation to the point of losing his self control. Thus, the appellant was found guilty under s. 304(a) of the Penal Code. The H appellant appealed. It was the appellant's defence that, *inter alia*, he (i) had no intention of causing the death of the deceased; (ii) had exercised his right of private defence; and (iii) was gravely and suddenly provoked by the deceased. The appellant's submission was centred on that of private defence which according to him entitled the court to grant the appellant a full discharge and acquittal of the offence.

I

Held (affirming conviction and sentence)
Per Rhodzariah Bujang JCA delivering the judgment of the court:

(1) It was not legally possible for the appellant to be given an outright discharge amounting to acquittal even if his right to private defence had been established on a balance of probability. The legislative scheme of s. 300 read under s. 304(a) gives rise to no interpretation other than this – which is that the successful raising of any of the four exceptions to s. 300 would render the charge of murder unsustainable but instead was proof beyond reasonable doubt of a charge under culpable homicide not amounting to murder and for which the punishment was provided by s. 304(a). Thus, even if private defence had been successfully raised by the appellant, he must still be convicted and punished for culpable homicide not amounting to murder. (paras 10 & 11)

(2) As shown in the photograph of the master bedroom taken the very morning of the incident, there was clearly a stool lying on the bed in the bedroom which evidence lent credence to the appellant's testimony that he was first attacked by the deceased in the bedroom. Considering the above evidence and having examined the evidence of the appellant, the undisputed fact that he had suffered the injuries as noted in the medical report, there was indeed sudden and grave provocation by the deceased – by her continued attack on him in the kitchen after the initial one in the bedroom. A reasonable man similarly circumstanced would have lost his self-control and retaliated the way the appellant did. (paras 13 & 14)

(3) The fact that 40 injuries were caused to the deceased in the heat of the moment was not *ipso facto*, evidence that the provocation was not sufficiently grave enough because the retaliation by the appellant was not to say, taking a weapon such as a pistol or a knife to attack the deceased but using a similar weapon that she had used, *to wit*, a wooden stool. This was supported by the fact that two broken wooden stools were found in the kitchen. It was probable that so many injuries were caused because the kitchen was dimly lit and the appellant was merely swinging the stool wildly at the deceased. The fact that a four legged stool was the weapon used gave further justification to the number of injuries caused because the impact it had on the body would most probably be multiple. Thus, the decision of the JC was affirmed. (paras 14 & 15)

(4) In view of the advanced age of the appellant, his health conditions and his almost two years remand pending the trial before his release on bail, the decision to sentence him to 12 years' imprisonment was not one which warranted intervention. A bond of good behaviour for such a serious crime as this in which a life was lost would make a mockery of the law. (para 15)

A ***Bahasa Malaysia*** *Headnotes*

Perayu, seorang lelaki berumur 67 tahun, pada asalnya dituduh membunuh si mati, perempuan simpanannya yang berasal dari China, di kediamannya. Selepas perbicaraan penuh, Pesuruhjaya Kehakiman ('PK') mendapati atas fakta bahawa Pengecualian 1 s. 300 Kanun Keseksaan terpakai dan
B mensabitkan perayu dengan homisid salah yang tidak terjumlah sebagai membunuh. Perayu dijatuhkan hukuman penjara 12 tahun. Fakta-fakta menunjukkan bahawa si mati didapati terbaring dalam keadaan berlumuran darah atas lantai dapur dengan sebuah kerusi kayu yang terpatah di sebelahnya. Perayu kemudiannya ditahan dan semasa dipersoalkan, perayu
C mengakui bahawa dia telah bertengkar dengan si mati dan telah memukulnya dengan kerusi kayu sebagai balasan terhadap serangan si mati ke atasnya selepas dia enggan memberikan si mati duit untuk membeli tiket penerbangan balik ke China. Menurut perayu, si mati telah membaling kerusi kayu terhadapnya dan telah mengejarnya dengan satu kerusi kayu lagi.
D Perayu berada di dapur apabila dia membalas balik dengan satu kerusi kayu. Si mati mengalami 40 kecederaan atas tubuh badannya disebabkan trauma kekerasan tumpul akibat dipukul dengan objek tumpul. Kecederaan yang membawa maut adalah pada kepala yang menyebabkan pendarahan subdural. Perayu sendiri telah mengalami beberapa kecederaan yang boleh
E digambarkan sebagai kecederaan pertahanan. Selepas menilai keterangan, PK mencapai kesimpulan bahawa perayu menyerang si mati akibat provokasi keterlaluan dan tiba-tiba sehingga perayu hilang kawalan diri. Oleh itu, perayu didapati bersalah bawah s. 304(a) Kanun Keseksaan. Perayu merayu. Pembelaan perayu adalah, antara lain, bahawa dia (i) tidak mempunyai niat untuk menyebabkan kematian si mati; (ii) telah melaksanakan haknya untuk
F pertahanan persendirian; dan (iii) diprovokasi secara keterlaluan dan tiba-tiba. Hujahan perayu berpusat pada pertahanan persendirian yang menurutnya memberikan hak pada mahkamah untuk memberikan perayu pelepasan penuh dan pembebasan daripada kesalahan itu.

G **Diputuskan (mengesahkan sabitan dan hukuman)**
Oleh Rhodzariah Bujang HMR menyampaikan penghakiman mahkamah:

(1) Tidak mungkin sah dari segi undang-undang untuk perayu diberikan pelepasan berjumlah pembebasan walaupun haknya ke atas pertahanan persendirian telah dibuktikan atas imbangan kebarangkalian. Skim
H perundangan s. 300 dibaca bawah s. 304(a) memberikan pentafsiran ini – iaitu kejayaan membangkitkan mana-mana daripada empat pengecualian s. 300 akan membuatkan pertuduhan bunuh tidak boleh dikekalkan tetapi adalah bukti melampaui keraguan munasabah bahawa terdapat pertuduhan homisid salah yang tidak terjumlah sebagai
I membunuh dan hukumannya disediakan oleh s. 304(a). Oleh itu, jika pertahanan persendirian berjaya dibangkitkan oleh perayu, dia harus disabitkan dan dihukum untuk homisid salah yang tidak terjumlah sebagai membunuh.

(2) Seperti yang ditunjukkan dalam gambar bilik tidur yang diambil pada pagi hari kejadian, jelas terdapat satu kerusi kayu atas katil yang buktinya menunjukkan testimoni perayu boleh dipercayai bahawa dia telah diserang dulu oleh si mati di bilik tidur. Mengambil kira keterangan tersebut dan setelah memeriksa keterangan perayu, fakta yang tidak dapat dipertikaikan yang dia mengalami kecederaan seperti yang dicatatkan dalam laporan perubatan, memang terdapat provokasi keterlaluan dan tiba-tiba oleh si mati – melalui serangan bertalu-talu oleh si mati ke atas perayu dalam dapur selepas serangan asal di bilik tidur. Seorang yang munasabah yang berada dalam keadaan yang sama akan hilang kawalan diri dan bertindak balas seperti tertuduh.

(3) Fakta bahawa 40 kecederaan dikenakan ke atas si mati yang tercetus dalam keadaan marah tidak *ipso facto* menjadi keterangan bahawa provokasi tidak memadai kerana tindakan balas tertuduh bukanlah dengan mengambil senjata seperti pistol atau pisau untuk menyerang si mati tetapi dengan menggunakan senjata yang sama yang telah digunakan oleh si mati, iaitu, kerusi kayu. Ini disokong oleh fakta bahawa dua kerusi kayu dijumpai di dapur. Kemungkinan segala kecederaan yang dikenakan ke atas si mati adalah kerana dapur berada dalam keadaan agak gelap dan perayu telah mengayunkan kerusi kayu itu tidak tentu arah terhadap si mati. Fakta bahawa kerusi kayu itu adalah senjata yang digunakan memberi justifikasi terhadap bilangan kecederaan kerana kesannya ke atas badan kemungkinan besar berganda. Oleh itu, keputusan PK disahkan.

(4) Mengambil kira umur perayu, keadaan kesihatannya dan bahawa dia telah dua tahun berada dalam reman sementara menunggu perbicaraan sebelum dilepaskan atas ikat jamin, keputusan menjatuhkan hukuman 12 tahun penjara bukanlah satu keputusan yang mewajarkan campur tangan. Bon berkelakuan baik untuk jenayah yang agak serius ini di mana berlakunya kehilangan nyawa akan memperlekehkan undang-undang.

Case(s) referred to:
Daud Pasarrin v. PP [2016] 10 CLJ 32 CA ***(refd)***
Ikau Mail v. PP [1973] 1 LNS 51 FC ***(refd)***
Lorensus Tukan v. PP [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 294
Penal Code, ss. 96, 300, 304(a)

For the appellant - Ranbir Singh Sangha; M/s Ranbir S Sangha & Co Advocs
For the respondent - Norinna Bahadun; DPP

[Editor's note: For the High Court judgment, please see PP v. Yong Kim Nyien [2017] 1 LNS 2295 (affirmed).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Rhodzariah Bujang JCA:

[1] The appellant, a 67-year old man and a vegetable seller at the material time of the offence, was originally charged with murder of his 46 years old
B lived-in mistress, a Chinese national at his house at Liteview Garden, Jalan Airport, Miri, Sarawak. The charge against him, in Bahasa Malaysia reads:

> Bahawa kamu pada 14/12/2015 jam lebih kurang antara 0200 pagi hingga 0230 pagi di alamat L11612 Jalan Airport Liteview Garden 98000 Miri dalam daerah Miri, dalam negeri Sarawak, untuk meneruskan niat kamu
C telah membunuh Long Lifang (pasport no: E 1967234) seorang warganegara People's Republic of China dan oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan)

[2] After a full trial, the learned Judicial Commissioner (as His Lordship
D then was) found on the facts that exception 1 to s. 300 of the Penal Code applies and convicted the accused of culpable homicide not amounting to murder. He was sentenced to 12 years' imprisonment but was a free man pending his appeal, as well as that of the Public Prosecutor's (respondent) against the conviction and sentence because a stay of execution of the sentence was allowed by the learned Judicial Commissioner. Although we
E confirmed both the said conviction and sentence after hearing both the appellant's and the Public Prosecutor's respective appeals, the appellant still remained a free man pending his as well as that of the Public Prosecutor's further appeals to the Federal Court against the same for we too granted stay of execution on the same terms as those imposed by the learned Judicial
F Commissioner.

The Trial

[3] At the outset, it is best to state that there were no eye-witnesses to the crime. It was the accused's own action in going over to his brother's house,
G nearby his own, at 2.30am that same morning which prompted his brother, his nephew, his grandson and his brother's son-in law, one Liew Sin Kiong (PW2) to go over to his house and where they saw the deceased body lying in a pool of blood on the kitchen floor with a broken stool by her side. They all trooped there because, according to PW2, the appellant told his father in
H law, that is, the appellant's brother, that his house was broken into by thieves. PW2 said when he saw the appellant, there was blood on his head but he was not sure if it was bleeding. The appellant agreed in cross-examination that he was in a state of panic and trauma. PW2 then proceeded to call the emergency line 999 and this was received by Corporal Ramesh a/l Doraisamy (PW3) who then lodged a police report (exh. P7). The
I appellant was subsequently arrested by ASP Soliment Nyian (PW5) at 3.45pm on the same day. One ASP Thomas Sulok ak Ulik (PW11) was assigned to be the investigating officer of the case and he arrived at the scene

at 5am that morning where other police personnel including PW5 were already gathered there. He saw the deceased still lying in a pool of blood at the kitchen. Around and behind the deceased were broken pieces of wooden stool and he saw two broken stools which he believed were the murder weapon. PW11 also saw blood-stained footprints in the kitchen. His examination of the master bedroom also revealed a wooden stool on the bed and upon further physical examination of the house, he concluded that there was no forced entry into the house.

[4] On 15 December 2015 at 12.31pm, PW11 recorded a statement from the appellant (exh. D5 at pp. 740 to 743 of AR Vol 3[2]) who told him that an intruder came to the house and hit him with a wooden stool and likewise did the same to the deceased. They both struggled with the intruder in the kitchen area and it was the intruder who bashed up the deceased. PW11 concluded in his witness statement that he doubted the appellant's story about the intruder based on the evidence he saw in the house. His opinion was justified because two days later, the appellant whilst being questioned by him admitted in his statement (exh. D6) at pp. 744 to 747 of the same appeal record ("AR" for short) in gist that he quarrelled with the deceased and hit her with a wooden stool in retaliation to her attacks on him with also a stool after he refused to give her money (RM4,000) to purchase an airline ticket to go back to China. This version was in fact reiterated in his sworn evidence before the court.

[5] The quarrel over the request by the deceased for the said RM4,000 started, said the appellant, the night before when they went to bed and resumed after they got up at 2.10am in the morning. That was when the deceased, according to him, threw a wooden stool at him and when he went downstairs to the kitchen she continued the attack chasing him round and round the table with another wooden stool. It was there in the kitchen that he retaliated with his own wooden stool, which light was not switched on but was dimly lighted from that of his neighbour's house coming through from the window. The pathologist (PW9) testified that the deceased suffered altogether 40 injuries on her body caused by blunt force trauma as a result of being hit by a blunt object such as wood, iron or similar object. The fatal injuries were those to the head which led to subdural haemorrhage.

The above was just a brief summary of the evidence adduced by both the prosecution and the defence, necessary for the purpose of this appeal.

[6] It was not disputed that the appellant himself suffered injuries as shown in the photographs taken of him and exhibited as exh. P5 (13 to 16) and when shown these photographs, PW9 agreed that these could be described as defensive injuries. PW11 himself also agreed in his evidence at pp. 304 to 305 of the AR vol. 2(2) that there was swelling on the appellant's upper and lower eyelid, a stitched-up wound on his head, an injury to his abdomen and swelling on his left hand and middle finger caused by the attack

with a wooden stool by the deceased. Although the defence did not call the doctor who treated the accused to testify but the medical report from Miri Hospital which shows the admission date and time as 14 December 2015 at 3am was produced as prosecution's exh. P67 (pp. 730 to 731 of AR vol 3[2]).

[7] The learned Judicial Commissioner after evaluating the defence made these findings and conclusion at paras. 40 to 45 of the judgment.

> [40] The accused could not have intended to kill the deceased as the incident happened very fast and there was no lapse in time that the accused could have premediated the deceased's death. The court is entitled to consider not only the immediate act that caused the death but all relevant circumstances that preceded or surrounded that act. There was no reason for the accused to have attacked the deceased but he had done so due to the grave and sudden provocation to the point of losing his self-control and hit the deceased repeatedly. Other than that, their relationship had always been loving and cordial prior to this incident and there was no complaint of any abuse by the deceased towards the accused (*Public Prosecutor v. Rikky Purba* [2014] 3 CLJ).
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> [41] The accused said he reacted after he felt pain all over his body and the bleeding from the wound at his forehead. The provocation was in the form of physical attacks by the deceased with a wooden stool and it was sudden and grave. It was the deceased who had followed the accused from their bedroom upstairs to the kitchen downstairs where she hit the accused on his head and continue pursuing him.
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> [42] The prosecution submitted that the accused could easily run away to avoid from the deceased's attacks instead of staying put and hitting her back. In my view, this is not possible because the deceased was so closely behind him, armed with the wooden stool and hitting at him. Further at the age of 67 years old and having a spine problem with metal implants planted therein, the accused could not have run or walk faster compared to the 46 years old deceased.
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> [43] The fact that there were 40 injuries sustained by the deceased has not really affected the accused defence of grave and sudden provocation because the actions of the deceased had led the accused to have an inability to exercise self-restraint or to judge the situation with insight and balance. From the evidence adduced, the accused said that he could not see clearly as the light was not bright and he was only lucky that his blows in the dark hit the deceased, otherwise, he could have been hit badly by the deceased and become the victim of the murder instead.
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> [44] I am therefore satisfied that the acts of the accused were as a result of such provocative acts of the deceased and fell squarely within the Exception 1 to s. 300 of the Penal Code.
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> [45] Having evaluated the evidence at the end of defence case on the required standard of proof I find that the accused is guilty of the lesser offence of culpable homicide not amounting to murder under section 304(a) of the Penal Code and I convict him on this finding accordingly.

The Appeal

[8] In his written submission before us, learned counsel for the accused, Mr Ranbir Singh outlined the thrust of the defence at para. 3.12 as follows:

(i) That the accused had no intention of causing the death of the deceased.

(ii) That the accused had exercised his right of private defence.

(iii) That the accused was gravely and suddenly provoked by the deceased.

(iv) That a sudden fight broke out between the deceased and the accused.

(v) That the accused was not only unable to measure his blows with the stool but also unable to determine the direction in which his blows with the stool were aimed due to the fairly dark conditions at the place of the incident.

[9] Yet despite the raising of the said multiple defences under the law, his submissions both written as well as oral was centered only on that of private defence which according to him entitles the court to grant the appellant a full discharge and acquittal of the offence.

[10] All three defences as highlighted in paras. (ii) to (iv) above are specifically provided under exception 1 (grave and sudden provocation), exception 2 (private defence) and exception 4 (sudden fight) to s. 300 of the Penal Code and they each have their own legal requirements as specified in the aforesaid provisions before they could be successfully raised by an accused. Guided by the judgment of the learned Judicial Commissioner, the petitions of appeal and submissions (both oral and written) of the respective parties, we would be concentrating on the defence of grave and sudden provocation as found by the learned Judicial Commissioner and not that of private defence by the accused. This is simply because we are of the view that it is not legally possible for the accused to be given an outright discharge amounting to acquittal even if his right to private defence had been established on a balance of probabilities. We say this because the legislative scheme of s. 300 read under s. 304(a) gives rise to no interpretation other than this - which is that the successful raising of any of the four exceptions to s. 300 would render the charge of murder unsustainable but instead is proof beyond reasonable doubt of a charge under culpable homicide not amounting to murder and for which the punishment is provided by s. 304(a).

[11] In other words, the said four exceptions are complete defences for murder but not for culpable homicide not amounting to murder upon which an accused is entitled to an outright acquittal. This, we say, despite the fact that s. 96 of the Penal Code provides that nothing is an offence which is done in the exercise of the right of private defence for again, this provision must be read with the express provision of s. 300, in particular the opening words to each of the exceptions, *to wit* "culpable homicide is not murder if .... "

and that of s. 304 that is "Whoever commits culpable homicide not amounting to murder shall be punished ..." Thus, even if we agree that private defence has been successfully raised by the accused, he still must be convicted and punished for culpable homicide not amounting to murder.

Grave And Sudden Provocation

[12] The Supreme Court decision in *Lorensus Tukan v. PP* [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 has laid down the test to be applied in considering whether the said defence has been successfully raised and this has consistently been applied by our courts. It is couched in the following terms:

> The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused placed in the situation in which the accused was placed would be so provoked as to lose his self-control [see *Nanavati v. State of Maharashtra* and was in fact used by the learned Judge in his address to the assessors. Although there was no attack at the manner the learned Judge had dealt with the law on provocation in his summing-up to the assessors, but, in our opinion, he had seriously misdirected himself in the application of the law to the facts of the case. In our judgment, the learned Judge erred when he treated it as a matter of law when he should have regarded it as a question which according to law is to be deemed to be a question of fact on the issue whether the facts adduced amounted to grave and sudden provocation to reduce the offence from amounting to murder. Secondly, instead of applying the test of a reasonable man as propounded in *Nanavati* case and which he himself to use a different test that of the trial Court. In our judgment, this is a very grave misdirection. For what a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional value, etc. In short, the cultural, social and emotional background of the society to which an accused belongs. Since the learned Judge does not appear to be of the same race as the appellants we think it was wrong for him to disregard the test laid down in *Nanavati* case and the opinion of the 2nd assessor, who belongs to the same race as the appellant. As Lord Goddard correctly observed in *Kwaku Mensah* case at p. 93:
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> > The tests have to be applied to the ordinary West African villager, and it is on just such questions as these that the knowledge and common sense of a local jury are invaluable.

It all boils down to, as stated by the Federal Court in *Ikau Mail v. PP* [1973] 1 LNS 51; [1973] 2 MLJ 153 to what we would simplify as a reasonable man test. The passage in the said judgment reads as follows:

> To succeed in a defence of grave and sudden provocation, it is necessary in law for the defence to satisfy the court that not only by the act of the deceased that the accused had been deprived of the power of self control but such acts of provocation would also have deprived a reasonable man of the power of self-control.

[13] The learned Deputy Public Prosecutor submitted that the accused had not established the said defence because although the provocation was sudden, it was not grave. The scolding by the deceased and the asking for money would not have caused a reasonable man to lose his control to the point of being violent and from his own evidence, the appellant said the deceased hit him twice, the first blow was blocked by him but not the second one. Nonetheless his subsequent retaliation was violent and brutal. He had caused 40 injuries to the deceased and his reaction was disproportionate to the attack by the deceased. Further, he submitted that the accused's caution statement (exh. D6), contain factual omissions as opposed to his testimony in court and which the learned Judicial Commissioner did not consider particularly that the deceased had taken and hit him first with the stool when they were in the bedroom. However, we say, with respect that the said omission could be explained because as rightly pointed out by learned counsel for the appellant, PW11 in his cross-examination at p. 325 lines 5 to 7 of AR Vol 2(2), agreed that not the entire information given by the accused was recorded by him in exh. D6. Further, as shown in the photograph no 31 of the master bedroom [at p. 471 of AR vol 3(1)], taken the very morning of the incident, there was clearly a stool lying on the bed in the bedroom which evidence lends credence to the accused's testimony that he was first attacked by the deceased in the bedroom.

[14] Considering the above evidence and having examined the evidence of the appellant, the undisputed fact that he has suffered the injuries as noted in the medical report and as rightfully conceded by the learned Deputy Public Prosecutor that there was sudden provocation, we are of the same view with the learned Judicial Commissioner that there was indeed a grave provocation by the deceased - not by her scolding or nagging about the money to go back to China but by her continued attack on him in the kitchen after the initial one in the bedroom. Even if the learned Judicial Commissioner did not expressly state so in his judgment, we are of the view that a reasonable man similarly circumstanced would have lost his self-control and retaliated the way the accused did. The disproportionate retaliation as submitted by the learned Deputy Public Prosecutor is more of a requirement to the right of private defence, not so much that of sudden and grave provocation. Of course as stated in *Ratanlal and Dhirajlal's Law of Crimes* and quoted by this court in *Daud Pasarrin v. PP* [2016] 10 CLJ 32 at p. 39, the court may consider, along with other factors, the nature of the retaliation by the accused, having regard to the nature of the provocation. This position in law has in fact been endorsed by the Federal Court in *Che Omar*'s case at para. 292 para. 17 of the same judgment. Here, the fact that 40 injuries were caused to the deceased in the heat of the moment does not *ipso facto*, be evidence that the provocation was not sufficiently grave enough because the retaliation by the accused was not to say, taking a weapon such as a pistol or a knife to attack the deceased but using a similar weapon that she had used,

to wit, a wooden stool. This is supported by the fact, from the evidence of PW11 as stated earlier, that two broken wooden stools were found in the kitchen. It is probable, as submitted by the defence that so many injuries were caused because the kitchen was dimly lighted and the accused was merely swinging the stool wildly at the deceased. The fact that a four-legged stool was the weapon used gives further justification to the number of injuries caused because the impact it had on the body would most probably be multiple, compared to say a weapon like a piece of wood or a parang for one strike would cause one injury and therefore the number of injuries would be evidence of the number of strikes or blows inflicted on the body.

[15] Thus, for all the reasons stated above, we have decided to affirm the decision of the learned Judicial Commissioner on the conviction and likewise the sentence. In respect of the latter, we wish to make it clear that the learned Deputy Public Prosecutor in both his oral and written submissions before us did not address on the inadequacy of the sentence even though it was one of the points raised in their petition of appeal but the learned counsel for the appellant. He said as he did before the Judicial Commissioner that a binding over under s. 294 of the Criminal Procedure Code was appropriate punishment because of the age of the accused, deteriorating health conditions as itemised at p. 35 of his written submission, such as benign prostate hypertrophy, type 2 diabetes and hypertension with chronic renal failure as well as the extenuating circumstances under which the offence was committed which was the grave and sudden provocation by the deceased. However, that last point has already been factored into the conviction for the lesser charge and we do not think it should be used to reduce the sentence further. What we must consider is that a life was lost in this incident and the maximum penalty under the law was 30 years' imprisonment. The learned Judicial Commissioner had deemed it fit to not even give half of that maximum despite the fact that it was a conviction entered after a full trial. In view of the advance age of the accused, his health conditions and his almost two years remand pending the trial before his release on bail, the decision to sentence him to 12 years' imprisonment was in our view not one which warranted our intervention. A bond of good behaviour for such a serious crime as this in which a life was lost would, with respect to learned counsel, make a mockery of the law.